Supreme Court, U.S.
FILED
AUG 10 1999
OFFICE OF THE CLERK

No. 98-1990

IN THE

Supreme Court of the United States

KATHLEEN MOLE,

Petitioner,

v.

BUCKHORN RUBBER PRODUCTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Buckhorn Rubber Products, Inc., is a wholly-owned subsidiary of Myers Industries, Inc.

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FACTUAL BACKGROUND

Petitioner, Kathleen Mole, ("Mole") was an employee of Respondent, Buckhorn Rubber Products, Inc., ("Buckhorn") with a history of performance problems. During the course of her employment, Mole was diagnosed with multiple sclerosis. Over the course of 3½ years, Buckhorn exercised care, concern, and made every effort to accommodate Mole to enable her to perform her job in a satisfactory manner. Nevertheless, she was unable to do so for reasons completely unrelated to her medical condition.

Mole began her employment with Buckhorn on January 4, 1982 as a temporary clerk/typist in Buckhorn's Sales Customer Service Department at its Hannibal, Missouri facility. When Buckhorn terminated her employment on June 30, 1994, Mole held the title of Customer Service Coordinator and had performed customer service functions for approximately seven years at the Company's Milford, Ohio and Hannibal facilities. Her primary job functions consisted of communicating with Buckhorn customers on the telephone and serving and satisfying their needs in a professional manner. Her duties included providing customers with product information, application, availability, lead-time, pricing, and shipping schedules; receiving, addressing and responding to customer complaints; satisfying customer requests for order follow-up and expediting product shipments; receiving and processing customer order information in an accurate and timely manner; and preparing and then entering customer order information into Buckhorn's computer system on the date it was received, which also included directing the Company's electronic data interchange ("EDI") system. All dealings with customers were to be handled in a manner which reflected their

importance to Buckhorn. Buckhorn customer service representatives were to take every action necessary to satisfy customers' needs.

Two years before Mole was diagnosed with multiple sclerosis, Buckhorn management observed and brought to Mole's attention its serious concerns about her job performance. Mole's immediate supervisor, David Johnston, met with her on numerous occasions to advise her of his dissatisfaction with her work, examples of which included: her rudeness to Buckhorn customers, resulting in certain customers refusing to deal with her; her failure to provide leadership and direction in her department; her general disorganization; her frequent errors in entering key customer information into Buckhorn's computer system and disseminating customer information to other Buckhorn employees, which resulted in delays in scheduling and in receiving customer payments; her mishandling of customer accounts; and her inability to properly utilize the Company's EDI computer system used by major customers in submitting orders. Johnston and Buckhorn's Human Resource Manager, Ron Meyer, warned Mole that a lack of improvement in her job performance and further negative dealings with customers would result in disciplinary action. Significantly, the Company addressed all of the above deficiencies with Mole in the two years prior to her diagnosis with multiple sclerosis.

Even after her diagnosis, when the quality of her work continued to be substandard, Buckhorn management sought to accommodate Mole in every possible manner and repeatedly inquired as to how they could further assist her to raise her performance to an acceptable level. Despite Buckhorn's inquiries, during the entire course of her

employment Mole never requested nor communicated the need for any specific work accommodation, but rather always maintained that she was "fine." The accommodations provided by Buckhorn included, but were not limited to:

1) Providing Mole with fully paid time off for all periods of hospitalization;

2) Providing Mole with fully paid time off for all of her doctor visits;

3) Recommending and referring Mode to a specialist upon learning that she might be ill;

4) Reducing Mole's job responsibilities and workload by redistributing customer accounts without reducing her pay;

5) Allowing Mole to work half days on numerous occasions and be paid for a full day;

6) Granting Mole fully paid leaves of absence;

7) Allowing Mole to take extended break periods;

8) Hiring a temporary employee who assisted Mole with her clerical duties and lessening Mole's workload upon her return from leave of absence;

9) Assisting Mole in getting beta interferon, an experimental medication which her physician

had prescribed for her, approved for coverage by Buckhorn's health insurance carrier;

10) Informing Mole's physician that any additional leaves of absence would not be a problem; and

11) Allowing Mole a lengthy period of time to improve her substandard performance.

Even Mole's own physicians acknowledged that each of the above-listed actions by Buckhorn constituted a reasonable accommodation of Mole's multiple sclerosis.

Despite all of Buckhorn's accommodations, the quality of Mole's job performance continued to decline. She continued to make costly errors processing customer orders but with more frequency. She also continued to interact negatively with customers.

On a number of occasions, Mole sat at her desk and did absolutely nothing. When asked if she needed to go home for the day, Mole declined, but her duties frequently had to be completed by other employees.

On February 10, 1994, Johnston met with Mole to address her continuing performance problems. During their meeting, Johnston outlined five significant errors and omissions by Mole. He emphasized that her performance had not improved and she continued to conduct herself inappropriately with customers. He further advised Mole that continued lack of improvement would lead to the termination of her employment. At no time did Mole ever indicate the need for any assistance or accommodation from Buckhorn

to help her perform her job. Coincidentally, from January through July, 1994, the six months immediately prior to her discharge, Mole's physician found her multiple sclerosis to be in remission and not active, and described her office examinations as being "quite good." Mole's physician further acknowledged the absence of any clinical findings that would have precluded Mole from performing her job duties at Buckhorn during this period of time. Indeed, Mole acknowledged that she was not experiencing any problems with her multiple sclerosis during this time period and there was nothing about her medical condition that prevented her from performing her job at an acceptable level. Nevertheless, despite her improved medical condition, Mole's job performance continued to decline during the first half of 1994.

Buckhorn finally determined that it could no longer endure Mole's inadequate job performance in a customer service capacity. After determining that it did not have any other available positions for her, the Company terminated Mole's employment effective June 30, 1994. On July 14, 1994, two weeks after her termination, Mole returned to the Company and demanded her job back as an accommodation. Based on the unsatisfactory quality of her work demonstrated over a three and one-half year period, the Company rejected her demand.

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act ("ADA") provides that:

> [no] covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement or discharge of employees.

42 U.S.C. § 12112(a)(1995).

The ADA further defines "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8)(1995).

REASONS FOR DENYING THE WRIT

I.

THE WRIT MUST BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO THE DISPOSITIVE ISSUE IN THIS CASE; SPECIFICALLY, THAT MOLE BEARS THE BURDEN OF PROVING THAT SHE WAS A "QUALIFIED INDIVIDUAL" UNDER THE AMERICANS WITH DISABILITIES ACT.

A. Mole misstates the law in claiming that the Fifth and Sixth Circuits are in conflict with the other circuit courts of appeals in requiring the employer to bear the burden of proof on the issue of whether an employee is a "qualified individual" under the ADA. In fact, all of the cases in those circuits, as in every other circuit, place the burden of proof on the employee.

The Eighth Circuit's decision and method of analysis in this case is consistent with every recent case in every other circuit under the ADA.

In order to claim the benefit of the ADA, an employee must be a "qualified individual," 42 U.S.C. § 12112(a) — that is a person with a disability who can perform the essential functions of her job, with or without reasonable accommodations. 42 U.S.C. § 12111(8) (1995). Mole argues that the Eighth Circuit erred in assigning her the burden of production and the burden of proof on the issue of whether she was a "qualified individual" under the ADA. Mole asserts that this Court should hear her case because other circuit courts of appeals, namely the Fifth and Sixth Circuits, place these burdens on defendant employers, rather than on plaintiff employees.

Mole's assertion is incorrect. Every circuit court of Appeals has applied the same standard of proof in such cases. The circuits universally require the plaintiff to bear both the burden of production and the burden of persuasion on the issue of whether she is a "qualified individual" under the ADA. This burden applies to all claims brought under the ADA whether alleged under a theory of failure to accommodate, disparate impact, or disparate treatment.

Attempting to manufacture a split among the circuits where no such split exists, Mole misstates the controlling precedent of both the Fifth and Sixth Circuits. The Fifth Circuit has consistently held that an employee bears the burden of proof as to whether she is a "qualified individual" under the ADA. "[Plaintiff] has the burden of proving that she can perform, with or without reasonable accommodation, all of the essential elements of her job." *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996). In *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1093 (5th Cir. 1996), the Court stated:

> [t]o avoid summary judgment on whether he is a qualified individual, [Plaintiff] Turco needs to show (1) that he could perform the essential functions of the job in spite of his disability; or (2) that a reasonable accommodation of his disability would have enabled him to perform the essential functions of the job.

Indeed, the Fifth Circuit could not have been any more unequivocal on this issue than in *Rizzo v. Children's World Learning Ctrs., Inc.*, 173 F.3d 254, 262 (5th Cir. 1999), stating: "[t]he district court properly assigned to [Plaintiff] Rizzo the burden of proving she was a qualified individual with a disability."

The Sixth Circuit has also held with unmistakable clarity that the plaintiff bears the burden of proving that she is a "qualified individual." "[T]he disabled individual always bears the burden of proving that he or she is 'otherwise qualified' for the position in question, absent the challenged job function or with the proposed accommodation." *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996). "To satisfy the second element of the *prima facie* standard, an employee 'must establish that a reasonable accommodation is possible, and bears a traditional burden of proof that she is qualified for the position with such reasonable accommodation.' " *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 781 (6th Cir. 1998) (citing *Monette*, 90 F.3d at 1186 n.12).[1]

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1. *See also Hamlin v. Charter Township of Flint*, 165 F.3d 426, 429 (6th Cir. 1999) (citing *Monette*, 90 F.3d at 1186) (stating that to establish a *prima facie* case of employment discrimination, the **employee** must show that he or she is " 'otherwise qualified' for

(Cont'd)

The precedent of the Fifth and Sixth Circuits is unremarkable in light of this Court's statement, albeit in dicta that:

> [a]n ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability" — that is, a person 'who, with or without reasonable accommodation, can perform the essential functions' of her job.

Cleveland v. Policy Management Systems Corp., __ U.S. __, 119 S. Ct. 1597, 1603 (1999) (quoting 42 U.S.C. § 12111(8)).

The Fifth and Sixth Circuits are in harmony with all other circuits in requiring that plaintiff bear both the burden of production and the burden of persuasion or to whether she is a "qualified individual."[2] This burden is plaintiff's in all ADA

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the position despite the disability"); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998) (stating that plaintiff's *prima facie* case under the ADA requires **plaintiff** to establish that "he is qualified, that is, with or without a reasonable accommodation, which he must describe, he is able to perform the essential functions of the job") (citation omitted); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996) (stating that **plaintiff** must establish that "she was qualified for the position, with or without accommodation" as part of her *prima facie* case) (emphasis added).

2. • *First Circuit.* "The **[plaintiff]** bore the burden of showing that [she] was qualified to perform, either with or without reasonable accommodation, the essential functions of her job." *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 142-44 (1st Cir. 1997) (citing *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996)) (footnote omitted); *cf. Champagne v. Servistar Corp.*, 138 F.3d 7, 12 (1st Cir.
(Cont'd)

(Cont'd)
1998) (**employee** bears the burden of proof on whether he or she is qualified); *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996) (stating that in order to establish reasonable accommodation case, **plaintiff** must show that she can perform essential job functions) (appeal of denial of motion for judgment notwithstanding the verdict dismissed) (emphasis added);

• *Second Circuit.* **Plaintiff** must establish a *prima facie* case of failure to accommodate by showing "that with reasonable accommodation, he could perform the essential functions of the position sought" and that "the employer has refused to make such accommodations" *Stone v. City of Mount Vernon*, 118 F.3d 92, 95-96 (2nd Cir. 1997) (citing *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1515 (2nd Cir. 1995), *cert. denied*, 522 U.S. 1112 (1998)); *Borkowski v. Valley Central School District*, 63 F.3d 131, 137-38 (2nd Cir. 1995) (Rehabilitation Act case) ("**plaintiff** bears the burden of-[production and persuasion] either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions") (emphasis added);

• *Third Circuit.* **Plaintiff** is required to establish *prima facie* case and carry burden of proof on issue of reasonable accommodation. *Lawrence v. National Westminster Bank of New Jersey*, 98 F.3d 61, 69-70 (3rd Cir. 1998) (emphasis added);

• *Fourth Circuit.* "In order to establish a *prima facie* case under the ADA, **[plaintiff]** must prove that . . . he is otherwise qualified for the job in question." *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 197 (4th Cir. 1997); *Runnebaum v. Nationsbank of Md., N.A.*, 123 F.3d 156, 174-75 (4th Cir. 1997) (stating that **plaintiff** bore burden of establishing *prima facie* case on the issue of whether he was "otherwise qualified" for job) (emphasis added);

• *Seventh Circuit.* "The **plaintiff** bears the burden of proof on this issue; she must be able to show that she is a 'qualified individual with a disability' in order to successfully prosecute an ADA claim."
(Cont'd)

(Cont'd)

Weilar v. Household Fin. Corp., 101 F.3d 519, 524-25 (7th Cir. 1998) (citing *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 n.3 (7th Cir. 1995)); *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.2d 1019, 1022 (7th Cir. 1997). ("No matter the type of discrimination alleged — either disparate treatment or failure to provide or reasonable accommodation — a **plaintiff** must establish first that he was a qualified individual with a disability."); *Weigel v. Target Stores*, 122 F.3d 461, 465 n.3 (7th Cir. 1997) (citing cases from six other circuits for the proposition that **plaintiff** is required to establish that she is a qualified individual as part of her *prima facie* case); *Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 484-85 (7th Cir. 1997) ("Under the ADA, the employer avoids all liability if the **plaintiff** would have been fired because incapable of performing the essential functions of the job, and the burden of proof on the issue of capability is not on the employer but on the **plaintiff.**") (citing *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996), *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1284 (7th Cir. 1996)); *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 911 (7th Cir. 1996) ("The **plaintiff** bears the burden of proof to show he is a 'qualified individual.' ") (citing *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995)); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996) ("The **plaintiff** bears the burden of proof on this issue; he must be able to show that he is a 'qualified individual with a disability' in order to successfully prosecute an ADA claim" (citing *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995) (emphasis added);

• *Eighth Circuit.* To establish *prima facie* case under the ADA, **plaintiff** must demonstrate that "he or she is qualified to perform the essential functions of the job (either with or without reasonable accommodation)" *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1998) (citing *Price v. S-B Power Tool*, 75 F.3d 362, 364 - 65 (8th Cir. 1996), *cert. denied*, 519 U.S. 910 (1996), *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995)) (emphasis added);

• *Ninth Circuit.* **Plaintiff** "bears the burden of establishing an ADA violation, [therefore] she must establish the existence of

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specific reasonable accommodations that [the employer] failed to provide." *Memmer v. Marin County Courts*, 169 F.3d 630, 633 (9th Cir. 1999) (citing *Weinrich v. Los Angeles County Metro Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997), *cert. denied*, 522 U.S. 971 (1997), *Barnett v. U.S. Air*, 157 F.3d 744, 748-49 (9th Cir. 1998)); *Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (9th Cir. 1997); *Sanders v. Arneson Products, Inc.*, 91 F.3d 1351, 1353 (9th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) (emphasis added);

• *Tenth Circuit.* **Plaintiff** bears burden of producing "sufficient . . . facial showing that accommodation is possible.") *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995) (emphasis added);

• *Eleventh Circuit.* **Plaintiff** must show that she "is a qualified individual"; "Moreover, the burden of identifying an accommodation that would allow a qualified individual to perform the job rests with that individual, as does the ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285-86 (11th Cir. 1997) (citing *Willis v. Conopco*, 108 F.3d 282, 283 (11th Cir. 1997)); *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1526 (11th Cir. 1997) (stating that **plaintiff** must prove "he is a qualified individual" (citation omitted); "The **plaintiff** retains at all times the burden of persuading the jury that reasonable accommodations were available.") (citing *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997)); *Willis v. Conopco, Inc.*, 108 F.3d 282, 284-85 (11th Cir. 1997) (concluding that **plaintiff** bears both burden of production and burden of persuasion on issue of reasonable accommodation) (citing *Barth v. Gelb*, 2 F.3d 1180, 1186 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1030, 128 L. Ed. 2d 190 (1994) (emphasis added).

• *D.C. Circuit.* **Plaintiff** bears burden of production and burden of persuasion. *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (*en banc*) (incorporating analysis set forth in *Barth*, 2 F.3d at 1186).

cases brought under theories of failure to reasonably accommodate, disparate treatment or disparate impact. Mole's attempt to avoid proving an essential element of her claim, that she was a "qualified individual," is not supported by controlling precedent in any United States Circuit Court of Appeals. In this case the Eighth Circuit correctly applied the law, as uniformly utilized by every other federal appeals court, and concluded that Mole failed to prove that she was a "qualified individual" as defined by the ADA, and that she was therefore not covered by the Act. Accordingly, certiorari must be denied.

B. In arguing that the Eighth Circuit improperly applied the *McDonnell Douglas* analytical framework, Mole mischaracterizes the Court's decision. Under any analytical framework, she bore the burden of production and the burden of persuasion.

Mole also erroneously argues that the Eighth Circuit applied the type of burden shifting analysis which this Court fashioned in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) for proving discrimination through indirect evidence. She compounds this error by arguing that the Eighth Circuit's alleged application of the *McDonnell Douglas* analysis led to an erroneous allocation of the burden of production and the burden of persuasion.

This is simply not so. First, the Eighth Circuit did not apply a *McDonnell Douglas* burden shifting analysis, as Mole suggests, to reach its conclusion that Mole was not a "qualified individual" entitled to ADA protection. Mole alleged that Buckhorn failed to reasonably accommodate her known disability and terminated her based on that disability. The Eighth Circuit dismissed Mole's claim under both

theories because: (1) Mole was not a "qualified individual" (a necessary element of both her claim for failure to reasonably accommodate and her claim for wrongful termination based on disability) and (2) she failed to establish that Buckhorn acted with discriminatory intent (a necessary element only of her claim for wrongful termination based on disability). In concluding that Mole was not a "qualified individual," the Eighth Circuit did not perform the type of burden shifting involved in a *McDonnell Douglas* analysis but rather affirmed the District Court based on undisputed evidence which established:

> Buckhorn documented serious performance deficiencies beginning in 1991 and Mole's failure to meet repeated demands for improved performance from 1992 until she was terminated in June 1994.
>
> * * *
>
> Buckhorn documented Mole's order inaccuracies and poor customer relations over an extended period of time. While admitting these deficiencies, Mole argues they were minor, citing testimony by co-workers and one customer expressing positive opinions about her job performance. However, these persons had much more limited contact with Mole and her work than [Buckhorn's sales manager, industrial relating manager, and customer service representative]. Mole bears the ultimate burden of proof on this issue, *See Benson*, 62 F.3d at 1113, and "consideration shall be given to the employer's judgment as to what functions of the job are essential." 42 U.S.C. § 12111(8).

Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212, 1217 (8th Cir. 1999).

The Eighth Circuit correctly concluded that summary judgment was appropriate because "Mole failed to present sufficient evidence that she could meet Buckhorn's legitimate job expectations with or without reasonable accommodation of her alleged disabilities." *Id.*, at 1218 (citation omitted). Because the Eighth Circuit held that Mole failed to establish the second element of her *prima facie* case, it did not need to address the issue of pretext or burden-shifting in arriving at its decision.[3] Since Mole failed to establish the necessary elements of her *prima facie* case, none of the distinguishing characteristics of the *McDonnell Douglas* analytical matrix played any role in the Eighth Circuit's affirmance of summary judgment.

Just as importantly, the circuit courts have not recognized any difference between the plaintiff's burden of proof on the issue of whether she is a "qualified individual" regardless of whether plaintiff claims a failure to "reasonably accommodate" her disabilities, disparate treatment, or disparate impact. "The disabled individual always bears the burden of proving that he or she is 'otherwise qualified' for the position in question, absent the challenged job function

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3. Nevertheless, in its opinion, the Eighth Circuit found alternative grounds for affirming summary judgment based on Mole's failure to establish the third prong of her *prima facie* case, *i.e.*, that she was discharged "under circumstances that raise an inference of unlawful disability discrimination." *Id.*, at 1216 (citation omitted). The Eighth Circuit based its conclusion on the undisputed fact that Mole's poor job performance evaluations began long before Buckhorn knew she had multiple sclerosis and continued for more than a year after the initial diagnosis. *Id.*

or with the proposed accommodation." *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996) (citing *Norcross v. Sneed*, 755 F.2d 113, 116-17 (8th Cir. 1985)). "[N]o matter the type of discrimination alleged — either disparate treatment or failure to provide a reasonable accommodation — a plaintiff must establish first that he was a qualified individual with a disability." *Sieberns*, 125 F.3d at 1022 (7th Cir. 1997). Therefore, consistent with all of the other circuits, the Eighth Circuit properly placed both the burden of production and the burden of persuasion on Mole on the issue of whether she was a "qualified individual."

II.

THIS COURT NEED NOT GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE BURDEN OF PROOF IN ADA CASES AND CASES DECIDED UNDER THE REHABILITATION ACT OF 1973 ("REHABILITATION ACT"). PRIVATE EMPLOYERS DO NOT HAVE THE SAME DUTY OF AFFIRMATIVE ACTION THAT HAS BEEN PLACED ON FEDERAL EMPLOYERS UNDER SECTION 501 OF THE REHABILITATION ACT.

Mole cites the Fifth Circuit's decision in *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981), a case involving a federal employer with a duty of affirmative action under § 501 of the Rehabilitation Act of 1973, (the "Rehabilitation Act") in support of her argument that private employers have the burden of production and the burden of persuasion on the issue of whether an employee is a "qualified individual" under the Rehabilitation Act. Mole correctly states that a number of circuits have placed the burden of production and burden of persuasion on federal

employers in cases decided under § 501 of the Rehabilitation Act.[4] However, both Congress and the courts have drawn a clear distinction between the affirmative action duties placed on federal employers under § 501 of the Rehabilitation Act and the duties placed on private employers.

Section § 791(g) of Title 42 makes it readily apparent and clear that Congress did not view cases involving the

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4. *Hall v. United States Postal Service*, 857 F.2d 1073, 1077 (6th Cir. 1988) ("[S]ection 501 of the Act requires federal employers . . . to undertake *affirmative action* on behalf of the handicapped. (Citation omitted). This affirmative action obligation goes beyond the obligation set forth in section 504, which by its terms, requires only non-discrimination." (Citing *Southeastern Community College v. Davis*, 442 U.S. 397, 410-11 (1979)); *see Fuller v. Frank*, 916 F.2d 558, 561 n.3 (9th Cir. 1990) ("This section requires that the Postal Service (along with all federal executive branch agencies) "submit . . . an affirmative action program plan for hiring, placement, and advancement of individuals with handicaps. . . ."); *Gardner v. Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985) ("Section 501(b), 29 U.S.C. § 791(b) requires the federal government as an employer to develop and implement affirmative action plans on behalf of handicapped employees.") (footnote omitted); *Treadwell v. Alexander*, 707 F.2d 473, 475 (11th Cir. 1983) ("Section 501 imposes on federal agencies a duty to take affirmative steps to ensure that handicapped individuals have equal access to employment opportunities in the federal government.") (footnote omitted).

But cf. Barth, 2 F.3d at 1186 (placing burden of production and burden of proof on government employee/plaintiff); *Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997) (placing burden of proof on plaintiff); *Leary v. Dalton*, 58 F.3d 748, 753 (1st Cir. 1995) ("[Plaintiff] must also show that with respect to his employment, he is a qualified individual with a [disability] who, with or without reasonable accommodation, can perform the essential functions of the position in question.") (citing 29 C.F.R. at 1614.203(a)(6) (internal quotation marks omitted).

federal government's duty of affirmative action in the same way that it viewed ADA cases. In § 791(g), Congress stated:

> The standards used to determine whether this section has been violated in a complaint alleging **non-affirmative action** employment discrimination under this section shall be the standard applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(Emphasis added).

This Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), stated:

> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome disabilities caused by handicaps. Section 501(b), governing the employment of handicapped individuals by the Federal Government, requires each federal agency to submit "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals . . ." include description of the extent to which and methods whereby the special needs of handicapped individuals are being met. However, because "[s]ection 504 [governing grantees] does not refer at all to

> affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.

Id., at 410-11. *See also Alexander v. Choate*, 469 U.S. 287, 300 n.20 (1984) ("it is clear from the context of *Davis* that the term 'affirmative action' referred to those 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial,' . . . or that would constitute 'fundamental alteration[s] in the nature of a program . . . ,' . . . rather than to those changes that would be reasonable accommodations.") (citation and internal quotation marks omitted).

"Section 501's provision for affirmative action in addition to section 504's prohibition of discrimination against the disabled indicates that federal employers are charged with a greater duty to ensure the employment of disabled workers than are federal grantees or private employers." *Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997) (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979)).

> Thus, while the ADA and the Rehabilitation Act *generally* are to be interpreted and applied consistently with one another, . . . the standards used to determine whether a federal employer has violated section 501 of the Rehabilitation Act will not always be identical to those employed in suits brought under section 504 or under the ADA.

Smith v. Midland Brake, Inc., 138 F.3d 1304, 1311 (10th Cir. 1998) (citations omitted). In *Smith*, the Tenth Circuit concluded that although a federal employer had a duty to reassign a federal employee to a vacant position, a private employer had no such duty.

The Fifth Circuit, the same court that decided *Prewitt*, assigned the burden of proof to the plaintiff in a case against a non-federal employer under § 504 of the Rehabilitation Act. In *McGregor v. Louisiana Univ. Bd. of Supervisors*, 3 F.3d 850, 858 (5th Cir. 1993), the Court stated that: "McGregor, therefore is entitled to the requested accommodations only if he can demonstrate that the accommodations constitute reasonable deviations from the Law Center's usual requirements 'which meet [his] special needs without sacrificing the integrity of the Law Center's program." *Id.* (citation and internal quotation marks omitted). *See Borkowski v. Valley Central School District*, 63 F.3d 131, 137-38 (2nd Cir. 1995) (Rehabilitation Act case) ("plaintiff bears the burden of [production and persuasion] either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions").

Contrary to the Rehabilitation Act cases assigning the burden of proof to federal employers, none of the federal courts has found that a private employer bears the burden of proof on the issue of whether a plaintiff is a "qualified individual" in a "reasonable accommodation" case under the ADA.

Mole further asks this Court to depart from all of the federal court decisions which have found that an employee bears the burden of proof under the ADA based on statements

in the legislative history which did not become part of the statute. Here, as in *Davis*, 442 U.S. at 411 n.11, the Court should decline to give force of law to statements which were not incorporated into the statute.

CONCLUSION

The Petition for Writ of Certiorari should be denied. The only grounds asserted by Mole as a basis for this Court's Jurisdiction are a purported split by two of the Circuit Courts of Appeals in the allocation of the burden of proof in ADA cases. Mole is flatly wrong in that assertion. There is no basis for the exercise of this Court's jurisdiction.

Respectfully submitted,

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